MEMO DECISION & ORDER



INDEX No. 26476/13

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/27/15
SUBMIT DATE 5/12/17
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD
Mot. Seq. # 003 - XMD
CDISP Y____ N X

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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

THOMAS RE a/k/a THOMAS C. RE, NATIONAL CITY BANK, ELAINE F. RE, JPMORGAN CHASE BANK, NA and "JOHN DOE", said name being fictitious, it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

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SHAPIRO, DiCARO & BARAK
Attys. For Plaintiff
175 Mile Crossing Blvd.
Rochester, NY 14624

MURRAY LAW GROUP, PC
Attys. For Defendant Re
132 Clyde St. - Ste. 1
West Sayville, NY 11791

FEIN, SUCH & CRANE, LLP
Attys. For Def. National City Bank
1400 Old Country Rd. - Ste. 103
Westbury, NY 11590

Upon the following papers numbered 1 to 16 read on this motion a default judgment, among other things, cross motion for leave to file a late answer and cross motion for an extension of time to oppose the cross motion ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers: 4-6; 7-9 ; Opposing papers: ; Reply papers 10-11; 12-14 ; Other 15-16 (affirmation) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion (#001) by the plaintiff for, among other things, a default judgment and the appointment of a referee to compute, is granted in its entirety; and it is further

***ORDERED*** that this cross motion (#002) by the defendant, Thomas Re, for leave to file and serve a late answer, is denied in its entirety; and it is further

***ORDERED*** that the motion (#003) by the plaintiff for, an extension of time to oppose the cross motion and serve reply papers or for a vacatur of default to the cross motion is denied as academic; and it is further

***ORDERED*** that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith.

This foreclosure action was commenced by filing on October 1, 2013. The matter was reassigned to this Part pursuant to Administrative Order No. 52-17, dated May 5, 2017 and submitted for decision on May 12, 2017. In essence, on September 24, 2003, defendant, Thomas Re, borrowed $1,153,750.00 from plaintiff's predecessor-in-interest and executed a Consolidation, Extension, and Modification Agreement to Washington Mutual Bank, FA. Thereafter, the defendant Thomas Re executed a Consolidation and/or Modification Mortgage dated January 1, 2012, in the sum of $1,268,266.07, to plaintiff, who is the successor in interest by purchase from the FDIC, as receiver for Washington Mutual Bank, FA. Plaintiff executed a Purchase and Assumption Agreement with the FDIC (*see* ***JPMorgan Chase Bank, NY v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***JP Morgan Chase Bank N.A. v Miodownik***, 91 AD3d 546, 937 NYS2d 192 [1st Dept 2012]). Since January 1, 2013, the defendant has failed to pay the monthly installments due and owing. Defendant has failed to submit a timely answer to the complaint, but by counsel, did file an untimely notice of appearance dated July 30, 2014 and received by plaintiff's counsel on August 4, 2014.

Plaintiff has moved (#001) for a default judgment and an order of reference.

Defendant has cross moved (#002) for leave to file and serve a late answer. Defendant was served by substituted service (CPLR 308[2]) on October 14, 2013. The instant cross motion was originally returnable on January 27, 2015, some 15 moths thereafter. Defendant has failed to demonstrate grounds for vacating his default (*see* ***HSBC Bank USA v Traore***, 139 AD3d 1009, 32 NYS3d 283 [2d Dept 2016]). It is a well-known rule of law that to be entitled to such relief, it was incumbent upon the defendant to demonstrate "excusable default grounds" which require a showing of a reasonable excuse for the default and a demonstration of a potentially meritorious defense (*see* ***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011], *quoting*, ***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; ***HSBC Bank USA, Natl. Ass'n v Rotimi***, 121 AD3d 855, 995 NYS3d 81[2d Dept 2014]; ***Mannino Dev., Inc. v Linares***, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Community Preserv. Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]). The material facts of the asserted meritorious defense must be advanced in an affidavit of the defendant or a proposed verified answer attached to the moving papers (*see* ***Gershman v Ahmad***, 131 AD3d 1104, 16 NYS3d 836 [2d Dept 2015]; ***Karalis v New Dimensions HR, Inc.***,105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]).

Here, the defendant fails to advance a reasonable excuse for the default in answering the complaint. What little that is offered does not constitute a reasonable excuse or an excusable default

(*see* ***HSBC Bank USA, N.A. v Powell***, 148 AD3d 1123, __ NYS3d __ [2d Dept 2017]; ***U.S. Bank N.A. v Louis***, 148 AD3d 758, 48 NYS3d 458 [2d Dept 2017]; ***JPMorgan Chase Bank, N.A. v Boampong***, 145 AD3d 981, 44 NYS3d 189 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Patrick***, 136 AD3d 970, 25 NYS3d 364 [2d Dept 2016]; ***Federal Natl. Mtge. Assn. v Zapata***, 143 AD3d 857, 40 NYS3d 438 [2d Dept 2016]; ***U.S. Bank N.A. v Barr***, 139 AD3d 937, 30 NYS3d 576 [2d Dept 2016]).

Therefore, it is unnecessary to consider whether the defendant demonstrated a potentially meritorious defense. Even if it were otherwise, the defendant failed to demonstrate possession of a meritorious defense to the plaintiff's claim for foreclosure and sale. The only defenses of any merit set forth in the proposed answer concern standing.

One of the various ways standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the note prior to the commencement of the action. The production of such proof is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***U.S. Bank v Ehrenfeld,*** 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Godwin***, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Appellate case authorities have repeatedly held that in determining the standing of a foreclosing plaintiff, it is the mortgage note that is the dispositive instrument, not the mortgage indenture (*see* ***Aurora Loan Servs., LLC v Mandel***, 148 AD3d 965, 50 NYS3d 154 [2d Dept 2017]; ***Everhome Mtge. Co. v Pettit***, 235 AD3d 1054, 23 NYS3d 408 [2d Dept 2016]). This result is mandated by the long standing principal incident rule which provides that because a mortgage is merely the security for the debt, the obligations of the mortgage pass as an incident to the passage of the note (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*). A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Loancare v Firshing***, 130 AD3d 787, 14 NYS3d 410 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see id.*, ***Wells Fargo Bank, NA v Parker***, 125 AD3d 8485 NYS3d 130 [2d Dept 2015]; ***U.S. Bank NA v Guy***, 125 AD3d 845, 5 NYS3d 116 [2015]).

Additionally, as was accomplished here, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b, coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*see*

***JPMorgan Chase Bank, N.A. v Venture,*** 148 AD3d 1269, 48 NYS3d 824 [3d Dept 2017]; ***Deutsche Bank Trust Co. v Garrison***, 146 AD3d 185, 46 NYS3d 185 [2d Dept 2017]; ***U.S. Bank Natl. v Saravanan***, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Logan***, 142 AD3d 861, 45 NYS3d 189 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Umeh***, 145 AD3d 497, 41 NYS3d 882 [1st Dept 2016]; ***Nationstar Mtge., LLC v Weisblum***, 143 AD3d 866, 39 NYS3d 491, 494 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Webster***, 142 AD3d 636, 37 NYS3d 283 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Federal Natl. Mtge. Assn. v Yakaputz II, Inc.***, 141 AD3d 506, 507, 35 NYS3d 236, 237 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Kobee***, 140 D3d 1622, 32 NY3d 767 [2d Dept 2016]; ***JPMorgan Chase Bank, N.A. v Roseman***, 137 AD3d 1222, 29 NYS3d 380 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 28 NYS3d 86 [2d Dept 2016]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2015]).

Under this statutory framework, it is clear that to establish its standing as the holder of a duly endorsed note in blank, a plaintiff is only required to demonstrate that it had physical possession of the note prior to commencement of the action (*see* ***Deutsche Bank Natl. Trust Co. v Brewton***, 142 AD3d 683, 37 NYS3d 25 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 645, *supra*). In such cases "'it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date'" since a plaintiff in possession of a note endorsed in blank is thus without obligation to establish how it came into possession of the instrument in order to be able to enforce it (*see* UCC 3–204[2]; ***Pennymac Corp. v Chavez***, 144 AD3d 1006, 42 NYS3d 239 [2d Dept 2016], *quoting* ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d at 645, *supra*). In addition, because "a signature on a negotiable instrument 'is presumed to be genuine or authorized' (*see* UCC 3–307[1][b]), the plaintiff is not required to submit proof that the person who endorsed the subject note to the plaintiff on behalf of the original lender was authorized to do so" (***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, 42 NYS3d 302 [2d Dept 2016]).

Moreover, the apparent invalidity of any written assignments of mortgage are thereby rendered irrelevant to the issue of standing (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*). It is the note that is the controlling document for standing purposes (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Aurora Loan Servs., LLC v Mandel***, 148 AD3d 965, *supra*; *see also* ***Deutsche Bank Natl. Trust Co. v Pietranico***, 32 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *affd.* 102 AD3d 724, 957 NYS2d 868 [2013]).

Indeed, the establishment of the plaintiff's actual possession of the mortgage note or its constructive possession through an agent on a date prior to the commencement of the action is so conclusive that it renders, unavailing, claims of content defects in allonges (*see* ***U.S. Bank v Askew***, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]). It further renders unavailing, all claims of content defects in the chain of mortgage assignments (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, *supra*; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Deutsche Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***US Bank Natl. Trust v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Deutsche Bank Natl. Trust v Whalen***, 107 AD3d 931, *supra*).

The affidavit of Kimberly Jernee, dated September 23, 2014, a Vice President of the plaintiff, JPMorgan Chase Bank, N.A., demonstrates that based upon her review of the records maintained by the plaintiff, with which she has personal knowledge, and kept and relied upon as a regular business practice and in the ordinary course of loan servicing business, the plaintiff came into possession of the original note before the commencement of the action. Such proof was sufficient to establish the plaintiff's standing due to it status as the holder of the mortgage note prior to the commencement of this action.

As recently held by the Second Department, a plaintiff that has possession of the note has standing, even where the plaintiff is the servicer and not the owner of the mortgage loan (*see* ***Central Mtge. Co. v Davis***, 149 AD3d 898, __ NYS3d __ [2d Dept 2017]). Here, plaintiff has demonstrated possession of the note prior to the commencement of the action (*see* ***OneWest Bank, FSB v Simpson***, 148 AD3d 920, 49 NYS3d 523 [2d Dept 2017]; ***Hudson City Sav. Bank v Genuth***, 148 AD3d 687, 48 NYS3d 687 [2d Dept 2017]; ***HSBC Bank USA v Espinal***, 137 AD3d 1079, *supra*; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]).

Finally, the Court holds that by entering into and making payments upon the modification agreement with plaintiff, defendant Thomas Re reaffirmed plaintiff's ownership rights to the note at issue (*see* Loan Modification Agreement, par. 3[C.]; *see also* ***IRB-Brasil Resseguros S.A. v Portobello Intern. Ltd.***, 84 AD3d 637, 923 NYS2d 508 [1st Dept 2011]).

The affirmative defenses asserted in the proposed answer of defendant, Thomas Re, to the extent they are premised upon a purported lack of standing, are without merit. The cross motion (#002) is denied in its entirety. The motion (#003) by the plaintiff for an extension of time to oppose the cross motion and to serve reply papers or for a vacatur of default to the cross motion is denied as academic.

Turning to plaintiff's unopposed motion (#001) for a default judgment and the appointment of a referee to compute, the application is granted. As noted above, the defendant has failed to offer a meritorious excuse for his default in answering the complaint (*see* ***Gilmore v Gilmore***, 286 AD2d 416, 730 NYS2d 239 [2d Dept 2001]). Here, the affidavit of merit is sufficient to support plaintiff's motion (*see* ***SRMOF II 2012-1 Trust v Tella***, 139 AD3d 599, 33 NYS3d 25 [2d Dept 2016]). Plaintiff has demonstrated its prima facie entitlement to a default judgment against the defendant (*see* ***Bank of New York Mellon v Izmirligil***, 144 AD3d 1067, 44 NYS3d 44 [2d Dept 2016]).

Although an express demand for dismissal of this complaint as abandoned pursuant to CPLR 3215(c) is not included in the defendant's notice of cross motion (#002), the Court will address the issue, even though it is only raised in the defendant's reply papers. Under the unique circumstances of this case, the Court concludes that the defendant's belated service of a notice of appearance constituted a waiver of the defendant's right to seek dismissal of the complaint pursuant to CPLR 3215(c) (*see* ***Meyers v Slutsky***, 139 AD2d 464, 527 NYS2d 464 [2d Dept 1988]; ***HSBC USA v Lugo***, 127 AD3d 502, 9 NYS3d 6 [1st Dept 2015] ["Defendant waived her right to seek dismissal ... because she did not object to plaintiff's treatment of her untimely answer as a notice of appearance ..."]; ***Hodson v Vinnie's Farm Market***, 103 AD3d 549, 959 NYS2d 440 [1st Dept 2013] ["That subdivision does not apply where, as here, the defendants served answers, albeit unverified ones"];

***Gilmore v Gilmore***, 286 AD2d 416, 730 NYS2d 239 [2d Dept 2001]; ***Sutter v Rosenbaum***, 166 AD2d 644, 561 NYS2d 72 [2d Dept 1990]; *see generally*, ***HSBC Bank USA, Natl. Assn. v Grella***, 145 AD3d 669, 44 NYS3d 56 [2d Dept 2016]; ***Rafiq v Weston***, 171 AD2d 783, 567 NYS2d 503 [2d Dept 1991]).

Although not necessary, even on the merits, the defendant's application must be denied. The Appellate Division, Second Department has instructed that in cases wherein no motion is interposed within the one year time limitation period, avoidance of a dismissal of the complaint as abandoned requires the plaintiff to offer a reasonable excuse for the delay in moving for leave to enter a default judgment and must demonstrate a potentially meritorious cause of action (*see* ***Giglio v NTIMP, Inc.***, 86 AD3d 301, 308, 926 NYS2d 546 [2d Dept 2011]; *see also* ***Kohn v Tri-State Hardwoods, Ltd.***, 92 AD3d 642, 937 NYS2d 865, 866 [2d Dept 2012]; ***115-41 St. Albans Holding Corp. v Estate of Harrison***, 71 AD3d 653, 894 NYS2d 896 [2d Dept 2010]; ***Cynan Sheetmetal Prods., Inc. v B.R. Fries & Assoc., Inc.***, 83 AD3d 645, 919 NYS2d 873 [2d Dept 2011]; ***First Nationwide Bank v Pretel***, 240 AD3d 629, 659 NYS2d 291 [2d Dept 1997]).

In addition, appellate case authorities have established that a moving defendant's failure to show prejudice by the plaintiff's delay in moving for the default may tip the balance in favor of a finding of sufficient cause to excuse the delay *provided* an explanation of the delay is advanced which evinces no intent to abandon the action and a meritorious cause of action is shown to exist (*see* ***LNV Corp. v Forbes***, 122 AD3d 805, 996 NYS2d 696, [2d Dept 2014]; ***Brooks v Somerset Surgical Assocs.***, 106 AD3d 624, 966 NYS2d 65 [2d Dept 2013]; ***Laourdakis v Torres***, 98 AD3d 892, 950 NYS2d 703 [1st Dept 2012]; ***LaValle v Astoria Constr. & Paving Corp.***, 266 AD2d 28, 697 NYS2d 605 [1st Dept 1999]; ***Hinds v 2461 Realty Corp.***, 169 AD2d 629, 632, 564 NYS2d 763 [1st Dept 1991]). Delays attributable to the parties' engagement in mandatory settlement conference procedures, or in litigation communications, discovery, motion practice and other pre-trial proceedings have been held to negate any intention to abandon the action and are thus excusable under CPLR 3215(c) (*see* ***HSBC Bank USA, Natl. Assn. v Grella***, 145 AD3d 669, *supra*; *see also* ***Brooks v Somerset Surgical Assocs.***, 106 AD3d 624, *supra*; ***Laourdakis v Torres***, 98 AD3d 892, *supra*).

Moreover, the determination of whether an excuse is reasonable in any given instances is committed to the sound discretion of the motion court (*see* ***Bank of New York Mellon v Izmirligil***, 144 AD3d 1067, 44 NYS3d 44 [2d Dept 2016]; ***Maspeth Fed. Sav. and Loan Assn. v Brooklyn Heritage, LLC***, 138 AD3d 703, 28 NYS3d 325 [2d Dept 2016]).

Here, the plaintiff has demonstrated, in its opposing papers, that sufficient cause exists for the delay within the contemplation of CPLR 3215(c) due to its engagement in a plethora of litigation-related activities from which an intent not to abandon its claims for foreclosure and sale is discernable. The RJI requesting a foreclosure settlement conference was mailed to the defendant on October 17, 2013. Thereafter, settlement conferences were held on March 12, 2014, May 23, 2014, July 30, 2014 and October 6, 2014. It is important to note that this matter was released from the CPLR 3408 foreclosure settlement conference part of the court, on October 6, 2014. This motion was made less than two moths thereafter. It is clear that under the applicable rule, 22 NYCRR §202.12-a(c )(7), all motions are to be held in abeyance while such conferences are being pursued. Here, unlike the two year delay in ***Wells Fargo Bank v Bonanno***, 146 AD3d 844, 45 NYS3d 173

(2d Dept 2017), a motion was timely made following the release from the conference part (*see generally*, ***State of New York Mtge. Agency v Linkenberg***, __ AD3d __, 2017 WL 2125760 [2d Dept 2017]).

The record reflects that plaintiff took active steps in pursuit of a default judgment after release from the conference part and there is no evidence of a pattern of willful noncompliance. The reasonable excuse offered is not conclusory or unsubstantiated. The court finds that the plaintiff demonstrated a reasonable excuse for the delay in moving for the fixation of the defendant's defaults (*see* ***Bank of New York Mellon v Izmirligil***, 144 AD3d 1067, 1069, *supra*; ***Maspeth Fed. Sav. and Loan Assn. v Brooklyn Heritage, LLC***, 138 AD3d 703, 794, *supra*; ***Golden Eagle Capital Corp. v Paramopunt Mgt. Corp.***, 143 AD3d 670, 38 NYS3d 438 [2d Dept 2016]; ***SRMOF II 2012-I Trust v Tella***, 139 AD3d 599, 33 NYS3d 25 [1st Dept 2016]; ***Iorizzo v Mattikow***, 25 AD3d 762, 807 NYS2d 663 [2d Dept 2006]; ***Harris v Morrison***, 49 AD3d 276, 851 NYS2d 871 [1st Dept 2008]; ***Ingenito v Grumman Corp.***, 192 AD2d 509, 596 NYS2d 83 [2d Dept 1993]).

In addition, the court finds that the plaintiff has advanced sufficient evidence of a meritorious cause of action for foreclosure and sale, in its verified complaint and the submitted affidavit of merit (*see* CPLR 3215[e]). Moreover, the absence of prejudice to defendant, Thomas Re, tips the balance in favor of the plaintiff. The record reflects that such defendant has enjoyed use of the mortgaged premises in Sag Harbor, NY, since January 1, 2013, when the default in payment occurred, without making any payments of amounts due for real estate taxes, insurance or other expenses. As reflected in the affidavit of merit, as of the date of this application in December of 2014, cumulative real property taxes totaled $36,355.28 and hazard insurance totaled $67,788.00, all amounts for which the plaintiff had to assume, to protect the mortgaged premises. In fact, the record reflects that there is no indication the defendant was in any way prejudiced by the plaintiff's delay (*see* ***First Nationwide Bank v Pretel***, 240 AD3d 629, *supra*).

Those portions of defendant's motion wherein he seeks dismissal of the complaint pursuant to CPLR 3215 are thus denied. [1]

Therefore, the Court grants plaintiff's motion (#001) in its entirety, denies defendant's cross motion (#002) in its entirety, denies as academic plaintiff's motion for an extension (#003) and simultaneously signs the proposed Order, as modified.

DATED: 2/23/17

THOMAS F. WHELAN, J.S.C.

[1] It appears that even if the motion were to be granted and the case dismissed, the plaintiff would have the right to recommence the action pursuant to CPLR 205(a) (*see* ***Wells Fargo Bank, NA v Eitani***, 148 AD3d 193, 47 NYS3d 80 [2d Dept 2017]).